

No. 92-1479

Supreme Court, U.S.
FILED

OCT 25 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL,
INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

ARDEN J. LEA
Counsel of Record
R. JEFFREY BRIDGER
LEA, PLAVNICKY &
SEABOLT, PLC
Queen and Crescent Building
344 Camp Street, Suite 900
New Orleans, Louisiana 70130
(504) 523-4500

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	5
I. There is a genuine choice to be made in this case between <i>pro tanto</i> and proportionate contribu- tion regimes	5
A. The <i>pro tanto</i> credit is incompatible with comparative liability	5
B. The <i>pro tanto</i> one satisfaction rule provides no basis for the Court of Appeals' double reduction of McDermott's recovery	6
II. The <i>pro tanto</i> rule adopted by the Fifth Circuit is unsound and should be rejected	9
A. The <i>pro tanto</i> credit regime provokes non- productive litigation	10
B. State and foreign <i>pro tanto</i> credit schemes provide no consensus on a uniform para- digm appropriate to the maritime law of comparative liability	12
C. The <i>pro tanto</i> credit unfairly fails to account for non-joint liabilities or damages	13
D. The <i>pro tanto</i> credit scheme entails improper diminution in due process despite an increase in the volume of litigation	15
III. The proportionate allocation rule provides the only choice compatible with fairness and the underlying federal policies favoring settlement and comparative liability in maritime law	18
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

<i>Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.</i> , Nos. 1911251 and 1911252, slip opinion, 61 U.S.L.W 2745, 1993 W.L. 154448 (Ala. May 14, 1993).....	10
<i>Beech Aircraft Corp. v. Jenkins</i> , 739 S.W. 2d 19 (1987)	12
<i>Bryanston Finance Ltd. v. deVries</i> , (1975) 1 QB 703	13
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....	17
<i>Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc. et al.</i> , 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (1974)	6
<i>Donovan v. Robbins</i> , 752 F.2d 1170 (7th Cir. 1985)	19
<i>Duncan v. Cessna Aircraft Co.</i> , 665 S.W. 2d 414 (Tex. 1984).....	12
<i>East River S.S. Corp. v. Transamerica Delaval, Inc.</i> , 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986)	13
<i>Edmonds v. Compagnie Generale Transatlantique</i> , 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) ...	9, 10
<i>F.D.I.C. v. Geldermann, Inc.</i> , 975 F.2d 695 (10th Cir. 1992).....	15, 16, 17
<i>Franklin v. Kay Pro Corp.</i> , 884 F.2d 1222 (9th Cir. 1989), cert. denied, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed. 2d 192 (1990).....	8, 14
<i>Gold Kist, Inc. v. Texas Utilities Electric Co.</i> , 830 S.W.2d 91 (Tex. 1992).....	12

TABLE OF AUTHORITIES – Continued

Page

<i>Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller</i> , 957 F.2d 1575 (11th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed. 2d 388 (1992).....	10, 13, 16
<i>Hernandez v. M/V Rajaan</i> , 841 F.2d 582 (5th Cir.), modified on other grounds, 848 F.2d 498, cert. denied, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed. 2d 562 (1988).....	4
<i>In re Masters Mates & Pilots Pension Plan</i> , 957 F.2d 1020 (2nd Cir. 1992)	15, 16
<i>In re Oil Spill by the Amoco Cadiz</i> , 954 F.2d 1279 (7th Cir. 1992).....	10
<i>In re Sunrise Sec. Litig.</i> , 698 F.Supp. 1256 (E.D. Pa. 1988).....	11, 18
<i>Leger v. Drilling Well Control</i> , 592 F.2d 1246 (5th Cir. 1979)	7, 9, 10, 14
<i>McDermott, Inc. v. Clyde Iron</i> , 979 F.2d 1068 (5th Cir. 1992)	14
<i>Miller v. Christopher</i> , 887 F.2d 902 (9th Cir. 1989)	17
<i>Self v. Great Lakes Dredge & Dry Dock Co.</i> , 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988).....	9, 10, 11, 13, 16
<i>TBG, Inc. v. Bendis</i> , 811 F.Supp. 596 (D.Kan. 1992)	16
<i>U.S.F. & G. v. Patriot's Point Development Authority</i> , 772 F.Supp. 1565 (D.S.C. 1991).....	17

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Reliable Transfer</i> , 421 U.S. 397, 95 S.Ct. 708, 44 L.Ed. 2d 251 (1975).....	6, 7
<i>Williams v. Fab-Con, Inc.</i> , 990 F.2d 228 (5th Cir. 1993).....	4
STATUTES:	
28 U.S.C. § 1292(a)(1).....	16
Federal Rules of Civil Procedure, Rule 56.....	17
OTHER:	
Prefatory Note, Uniform Comparative Fault, Act 12 U.L.A. 43 (Supp. 1992)	6

No. 92-1479

In The

Supreme Court of the United States

October Term, 1993

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL,
INC. and RIVER DON CASTINGS, LTD.,*Respondents.*

On Writ Of Certiorari

To The United States Court Of Appeals
For The Fifth Circuit**PETITIONER'S REPLY BRIEF****STATEMENT OF THE CASE**

River Don¹ acknowledges that both the Shearleg crane and SNAPPER deck were damaged in the 10 October 1986 incident; thus admitting that McDermott suffered actual damages to the Shearleg crane for which it was denied compensation from the hook defendants.

River Don mischaracterizes McDermott's acceptance of comparative liability for damages caused by the failure

¹ River Don is sometimes referred to herein, collectively with its trial co-defendant, as "hook defendants."

of the cable laid slings by attempting to obscure the fact that this stipulation was expressly made in the context of the sling defendants'² settlement and involved a stipulation or admission that the slings were *a* cause of damage.

River Don attempts to obscure the jury's determination of the sling defendants' liability, along with McDermott's, through apportionment of causation. River Don claims that the hook defendants only presented evidence of McDermott's *negligence* in regard to the sling failure, ignoring the fact that McDermott had accepted its and the sling defendants' liability for the sling failure, and stipulated to the slings' causation of damage, leaving only comparative apportionment by causation for the jury.³ Neither McDermott's nor the sling defendants' "fault" was in issue. Only the extent of the slings' causation of damage was tried.

Hook defendants took full advantage of McDermott's tactical decision to accept the sling defendants' liability, repeatedly having the jury instructed to allocate a share of liability to the parties jointly responsible for the slings: "McDermott/Sling defendants."⁴ Every bit of evidence offered by the hook defendants on their theory that the sling failure was the sole or primary cause of the accident was at least as inculpatory to the sling defendants as to

² "Sling defendants" refers collectively to British Ropes, Ltd., International Southwest Slings, Inc. and Hendrik Veder, B.V., also the settling defendants herein.

³ Joint Appendix pp. 27-31, 33-35, 40 and 42.

⁴ Joint Appendix pp. 26-28, 31-32, 38, and 40; Petition Appendix p. A-37.

McDermott. Indeed, the hook defendants argued vociferously at trial and to the Fifth Circuit that they had been foreclosed from presenting evidence of McDermott's fault – never recognizing that *causation not fault* with regard to the sling failure was the material issue at trial.

The Court of Appeals' undisputed determination that, in fact, causation not fault had been the liability allocation mechanism given to and used by the jury disposes of River Don's misconceptions about proof of "McDermott/Sling defendants" "fault". Petition Appendix pp. A-31-32. Moreover, hook defendants did not object to or assign as error the jury interrogatory which combined "McDermott/Sling defendants" for allocation of comparative liability. Petition Appendix p. A-37. In argument, River Don suggests that trial would have lasted a week longer had it had to litigate fully the sling defendants' fault, ignoring that the hook defendants had made their own tactical decision not to urge third-party claims against the sling defendants, but rather had focussed on attempts to cast fault upon McDermott for the sling failure. River Don also conveniently omits the fact that, in the absence of McDermott's settlement and stipulation of combined liability with the sling defendants, trial would have taken a week longer due to McDermott's presentation of its "failure to warn" and warranty cases against the sling defendants in rebuttal to the hook defendants' allegations of misuse of the slings.⁵ This Honorable Court should not be misled to think that a four week jury trial was conducted on only River Don's

⁵ Joint Pre-Trial Order, pp. 8-9, 13-18, 70-80, 89-91; Record Doc. 285.

theory and evidence as its propagandized "Statement of the Case" suggests.

It is also a mischaracterization to suggest, as River Don does, that *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir.), modified on other grounds, 848 F.2d 498, cert. denied, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed. 2d 562 (1988) was prevailing authority in the Fifth Circuit prior to its firm adoption in the present case. The Court of Appeals in *Williams v. Fab-Con, Inc.*, 990 F.2d 228, 233 (5th Cir. 1993) said,

"This court has noted that *Hernandez* and *Leger* are at odds, but our recent opinion in *McDermott, Inc. v. Clyde Iron, et al.* . . . clearly holds that . . . *Hernandez* is the law of this Circuit. Because the district court did not have the benefit of our decision in *McDermott*, we vacate the damage award to Fab-Con, and remand for reconsideration by the district court. [footnote omitted]"

Southern District of Texas Magistrate Judge Kelt also lacked the dubious benefit of the Fifth Circuit's decision in this case, as did the litigants at settlement and trial. Equal protection, therefore, requires remand in the present matter.

ARGUMENT

I. There is a genuine choice to be made in this case between *pro tanto* and proportionate contribution regimes.

Respondent, River Don's opening dissemblance that neither *pro tanto* nor proportionate "credit for settlement" provides a flawless procedure to account for settling defendants' shares of liability begs the question of which is better and which *one*, should apply in this case.

A. The *pro tanto* credit is incompatible with comparative liability.

The Maritime Law Association of the United States and the United States as amici curiae and the National Conference of Commissioners on Uniform State Laws, among others, have recognized that in the comparative liability environment of maritime law, a consistent, proportionate "settlement credit" or "contribution short-cut" is the appropriate means of fairly adjusting the equities among all parties.

"The NCCUSL has promulgated two uniform contribution Acts – the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata [equal share or "dollar for dollar"] contribution which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved."

Prefatory Note, Uniform Comparative Fault, Act 12 U.L.A. 43 (Supp. 1992) (emphasis added). River Don still fails to identify the legal basis in the maritime law of comparative liability for its claimed "right" to a "credit" for third parties' private contractual resolution of their liabilities with McDermott, Inc. In the comparative liability system of maritime tort law, proportionate contribution is the means by which equities between co-tortfeasors are settled. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc. et al.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (1974). Thus, McDermott, Inc. does not agree that non-settling defendants are entitled to a "credit," for that term denotes a creditor/debtor relationship that does not exist here; rather, McDermott, Inc. contends that River Don was entitled to and received a trial at which the proportionate liabilities of all actors, plaintiff, settling defendants and non-settling defendants, were presented and verdict and judgment rendered thereon. What all – even River Don – do agree on is that only *one* contribution scheme should be applied, not *both* as the Fifth Circuit erroneously did in this case. The underlying rationale of the "one satisfaction rule," of which River Don makes so much, is at least as much offended by a defendant's obtaining double contribution as it would be if a plaintiff obtained a double recovery.

B. The *pro tanto* one satisfaction rule provides no basis for the Court of Appeals' double reduction of McDermott's recovery.

The "one satisfaction rule," as posited by River Don, is a vestige of the pre-comparative liability, pre-third party practice, common law tort regime that *United States*

v. Reliable Transfer, 421 U.S. 397, 95 S.Ct. 708, 44 L.Ed. 2d 251 (1975) laid to rest. River Don's reversion to 19th century authorities in its extrapolation of a "one satisfaction rule" from the rule of joint and several liability among co-tortfeasors amply demonstrates the anachronism of its theory. Development of third party practice under the Federal Rules of Civil Procedure and of comparative liability in maritime law under *Reliable Transfer* superseded the ancient common law tort system that required an injured party to sue each tortfeasor individually, collecting as much of his damages as he could, with no contribution between them. In that former legal environment, River Don's "pro tanto one satisfaction rule" was probably the best that could be done. Since *Reliable Transfer*, greater fairness is attained by proportionate allocation of liability and the proportionate "one satisfaction rule" established in the Fifth Circuit by *Leger v. Drilling Well Control*, 592 F.2d 1246, 1250 n. 10 (5th Cir. 1979):

" . . . one totals the percentages of fault and sees that the total does not exceed [or fall short of] 100%."

All parties are, thereby cast with their proportionate shares of liability, which they satisfy by paying the plaintiff the judgment amount or an amount agreeable to plaintiff in settlement. Plaintiffs and settling defendants are bound by their bargain, while non-settling defendants are jointly and severally bound by the judgment. The fundamental inapplicability of the "dollar for dollar" one satisfaction rule in cases involving settlement of comparative liabilities is further demonstrated by the indisputable fact that:

"If all of the defendants had settled for a sum larger than the trial verdict, the one satisfaction rule would not be violated."

Franklin v. Kay Pro Corp., 884 F.2d 1222, 1232 (9th Cir. 1989), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed. 2d 192 (1990).

Even if a "dollar for dollar" one satisfaction rule applied generally, it would have no effect in this case. River Don wholly ignores the trial court's finding that the sling defendants' settlement did not exceed McDermott's damages, because approximately half of McDermott's total damage claim, its Shearleg Crane damages⁶, was foreclosed against River Don and AmClyde, but not against the settling sling defendants. McDermott, even with full benefit of its settlement, did not recover full compensation for its actual damages in this case. River Don also ignores the allocation of settlement proceeds made in the settlement, itself. See Petition Appendix p. A-59-65. As McDermott's damage claims were roughly half for the SNAPPER deck and half for the Shearleg crane, 50/50 apportionment of the settlement between crane and deck damages was reasonable and fair. Since \$500,000.00 is less than 30% of McDermott's deck

⁶ Shearleg crane damages were discussed at pages 16-18 of Petitioner's original Brief on the Merits. The proffered evidence of crane damages was identical in form to that admitted to prove deck damages. Petition Appendix pp. A-66 and 67. Reduction of the crane damage claim by the same percentage by which the jury reduced the deck damage claim yields \$2,439,454.80 as a fair approximation of what plaintiff's crane damage award should have been.

damages, the settlement resulted in no windfall or excess recovery.⁷

The trial court had the proffered evidence of Shearleg crane damages, the settlement agreement and a recently concluded trial to support its decision to deny River Don dollar for dollar credit. The Court of Appeals erroneously claimed to have none of these materials and compounded its mistake by giving the trial court's ruling no deference. The record of the Court of Appeals' error in this regard is sufficiently glaring that River Don cannot merely avoid addressing it before this Honorable Court, as it has in its brief, unless it intends, by its silence, to acknowledge that the Court of Appeals' summary grant of *double* contribution for the sling defendants' liability is insupportable under any theory.

II. The *pro tanto* rule adopted by the Fifth Circuit is unsound and should be rejected.

Respondent's mere reiteration of the Eleventh Circuit's ill-fated rationale in *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988) cannot repair its error-riddled analysis of *Edmonds* and *Leger* or render such a weak, result-oriented rule applicable to the present case. Simply put, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979), had

⁷ River Don also ignored the trial court's ruling that "... the settling [sling] defendants, ... were at the most thirty (30%) percent responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott). . . ." Petition Appendix p. A-52.

nothing to do with settlements; and if it did, application of its rule would result in *no* deduction, credit, or consideration for a settled and released party, just as none was allowed for Edmonds' statutorily immunized employer. *Leger* did not abrogate joint and several liability among co-tortfeasors; rather it reconciled and preserved the co-tortfeasors' contribution rights with the plaintiff's and settling defendant's rights to resolve contractually their portion of the case by settlement. See *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251 and 1911252, slip opinion p. 10, 61 U.S.L.W 2745, 1993 W.L. 154448 (Ala. May 14, 1993).

A. The *pro tanto* credit regime provokes non-productive litigation.

Conspicuous by its absence from *River Don's* discussion of *Self* and cases following its reasoning is any mention of the evolution, to date, of the *Self* rule in the "*Great Lakes Dredge*" litigation. This litigation "horror story", discussed at pages 32-33 of Petitioners' original Brief on the Merits, is clearly not mandated by *Edmonds*, nor suggested by any other case from this Court. *Self* and its scion, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed. 2d 388 (1992), raise the compelling rhetorical question that punctuated the discussion of contribution in *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1318 (7th Cir. 1992):

"At all events, why should the judicial system invest so heavily in adjusting accounts among wrongdoers? Neither justification for the tort

system – compensation of victims and the creation of incentives to take care – would be served by this collateral litigation."

Nonetheless, that court left the policy question open, as well as the door to further litigation on contribution claims. Imposition of the *Self pro tanto* credit system upon the comparative liability regime of maritime tort law allows the most intransigent wrongdoers to multiply ancillary litigation on contribution or "fairness" of a settlement bar *and* to defend at trial on grounds that someone other than itself – i.e. the settling party – actually caused the accident, receiving an additional comparative reduction in liability to the extent the defense succeeds. Why should the judicial system invest so heavily in allowing non-settling co-tortfeasors to obtain double benefit of settlements by adopting a *pro tanto* credit rule? There is no reason. If a case is to be tried on comparative liability principles, the parties will have to litigate the comparative causation of all actors in the incident, regardless of what rule of settlement credit, contribution, or no contribution is applied. *In re Sunrise Sec. Litig.*, 698 F.Supp. 1256, 1260 (E.D. Pa. 1988). The *pro tanto* credit, therefore, achieves no reduction in cost or complexity but negatively impacts fairness, deterrence and compensation goals of the tort system. Whether the experiences of the states or other countries suggest otherwise, by their varying applications of the *pro tanto* credit for settlement, is not so clear as *River Don* would have it.

B. State and foreign *pro tanto* credit schemes provide no consensus on a uniform paradigm appropriate to the maritime law of comparative liability.

Though more states have statutorily adopted a form of *pro tanto* credit, the rules employed and their courts' interpretations thereof have not been uniform. Texas, for instance, adopted an "either/or," modified proportionate/*pro tanto* settlement contribution scheme in cases solely sounding in negligence. Cases sounding in warranty, strict liability, or a mixture thereof should continue to be controlled by the proportionate causation rule of *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414 (Tex. 1984); *Gold Kist, Inc. v. Texas Utilities Electric Co.*, 830 S.W.2d 91, 93 n.1 (Tex. 1992), citing *Beech Aircraft Corp. v. Jinkins*, 739 S.W. 2d 19, 20 (1987).⁸ As the foregoing example illustrates and as virtually all courts and commentators agree, state laws provide no uniform paradigm for a maritime rule. The government also noted in its amicus brief (at p. 14 n.8) that several states applying a *pro tanto* credit approach do not have a comparative liability system. Thus, the variety of state laws are unhelpful in arriving at a uniform rule of federal maritime law.

The *pro tanto* credit rule applied by the United Kingdom, in a non-maritime case, not involving comparative

⁸ What is notable in the Texas statutory scheme is its express recognition that

" . . . [t]he amount of damages recoverable by the claimant may be reduced once . . . "

regardless of which credit scheme is chosen.

liability should not be persuasive in the context of American maritime law. The court's references indicate, as did respondents', the anachronism of the rule and its grounding in superseded "no contribution" or "divided damages" systems. In short, though various forms of a *pro tanto* credit for settlement have been applied in a wide range of circumstances, none have solved the fundamental problems of unfairness and inefficiency displayed in the *Self*/*"Great Lakes Dredge"* litigation and in the Fifth Circuit's double reduction of McDermott's judgment in this case.

C. The *pro tanto* credit unfairly fails to account for non-joint liabilities or damages.

In *Bryanston Finance Ltd. v. deVries*, (1975) 1 QB 703, 722, the court posited that, "in every tort, there is only one damage." In the present case, however, McDermott suffered two classes of damage for which, at the time of settlement, all defendants were potentially liable. Only after the trial court's ruling on the hook defendants' defenses under *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986), were the defendants' liabilities for deck and crane damages separated, such that the settling sling defendants proved to have been the only defendants from whom crane damages could have been recovered. The hook defendants were held to have no liability for crane damages; thus, sling and hook defendants were not jointly liable to McDermott on its crane damages and River Don should have only received a credit for the portion of the settlement attributable to the joint liability

for deck damages. While such a division was relatively easy for the trial court to discern in the present case, since the settling parties stipulated to a division and the proffered evidence of crane damages was fully developed and identical in form to the deck damages presented to the jury, the apportionment of settlement dollars between joint and independent liabilities is another issue open to ancillary litigation under a *pro tanto* credit scheme.

The Court of Appeals' ruling in the present case tossed aside fairness by refusing even to consider the apportionment of settlement funds stipulated by the parties thereto. *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1080-81 (5th Cir. 1992); Petition Appendix pp. A-27-29. The proportionate contribution "short-cut," developed in *Leger* and *Kay Pro*, *inter alia*, wholly avoids such problems, for only the parties' liabilities as determined at trial are considered or effected. Hypothetically, had McDermott settled entirely separate contract claims against the sling defendants for \$900,000.00, apportioning only \$100,000.00 in the agreement to the hook failure incident, under the proportionate allocation scheme, River Don would receive the same proportionate reduction in its comparative liability as if no other claims had been involved. However, with foreknowledge that a *pro tanto* credit would be given, under the same hypothesis, McDermott could develop a record to support such a lopsided apportionment of settlement funds, creating more ancillary litigation and effecting the non-settling defendant's liability, without regard to its relative culpability. Another facet of the same problem arises where there are actual or potential claims between settling and non-settling defendants independent of the plaintiff's

claims. A settlement bar based upon a fairness hearing on only the plaintiff's settlement could wrongly impinge upon such claims. See, e.g., *In Re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1032-33 (2nd Cir. 1992); *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d 695, 698-700 (10th Cir. 1992). The proportionate contribution mechanism, however, is necessarily specific to the matter tried – its effect reaches as far and no further than established principles of *res judicata* allow – without any additional consideration by the court or litigation by the parties.

D. The *pro tanto* credit scheme entails improper diminution in due process despite an increase in the volume of litigation.

Apart from the *pro tanto* credit scheme's facial unfairness, by turns, to plaintiffs or non-settling defendants, the requirement of ancillary fairness hearings render the scheme espoused by River Don markedly inefficient and potentially violative of due process. In comparing the efficiency or simplicity of the proportionate versus the *pro tanto* regimes, it must be recognized at the outset that, under either one, courts and juries will hear and be asked to decide whether and how much a non-settling defendant is responsible for damages relative to the plaintiff and any other potentially responsible actor, whether a settling party or not. The defense of third party liability is ubiquitous. See, Petitioner's Brief on the Merits, p. 23 n. 18. Recognizing that the two systems are on a roughly equal footing with regard to the likely complexity and length of trial, the real question becomes, which is least likely to foster ancillary litigation? The proportionate

allocation method, with its single trial resolving all relevant contribution issues between all parties best avoids the cost and uncertainty of collateral litigation. The *Self/Great Lakes Dredge* litigation, the present case, and other *pro tanto* cases cited herein, have documented a definite tendency of the *pro tanto* scheme to increase litigation collateral to the main case. Indeed, it is acknowledged by virtually all courts, commentators, and parties that a "fairness hearing" procedure is required, if contribution litigation is to be barred by the settlement.

River Don contends that the good faith/fairness hearings can be conducted expeditiously, citing *F.D.I.C. v. Geldermann, Inc.*, 763 F.Supp. 524 (W.D. Ok. 1990) which was reversed and remanded on an interlocutory appeal because the "fairness hearing/bar order" was improperly conducted by the district court.⁹ The other case cited, *TBG, Inc. v. Bendis*, 811 F.Supp. 596 (D.Kan. 1992) is rife with conclusions about potential state law claims not before the court (*Id.* at 601) and fine distinctions regarding the characterization of portions of the settlement funds (*Id.* at 608). The district court's effort to insure fairness was valiant, but clearly did not rise to the level of a judgment after trial nor did it meet the standards for summary judgment under Federal Rules of Civil Procedure, Rule 56. Nonetheless, the bar order purported to foreclose substantive claims between non-settling and settling defendants. See also *In re Masters Mates & Pilots Pension Plan*, 957 F.2d at 1033.

⁹ *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992). The bar order was held an appealable injunction under 28 U.S.C. § 1292(a)(1).

In *U.S.F. & G. v. Patriot's Point Development Authority*, 772 F.Supp. 1565 (D.S.C. 1991), the court stated:

"One can easily envision the due process problems that might arise should a court approve a settlement as adequately reflecting a settling defendant's relative culpability, only later to learn . . . that overwhelming evidence exists showing the error of that decision."

Overwhelming evidence is not required to push such an error across the foul-line of Rule 56 and *Celotex Corp. v. Catrett*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is sufficient. Given that quantum of damages and relative liability between the parties are ultimate factual questions rarely determinable as matters of law, such settlement approval/contribution bar rulings should be equally rare. As the Court of Appeals observed in *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d at 699,

"such [good faith settlement] confirmation procedures often tend to be abbreviated, imprecise, and lacking in the constitutional safeguards provided by a full and adversarial trial."

Moreover, the standards applied to assess "good faith/fairness" come nowhere near the level of certainty required by Rule 56 for summary adjudication of substantive claims. In *Miller v. Christopher*, 887 F.2d 902, 908 (9th Cir. 1989), the court affirmed a finding of good faith settlement, barring contribution saying:

"Settlement amounts, however, are often discounted to reflect the cost of trial to the plaintiff and the uncertainties of the trial's outcome. Further, requiring perfect foresight on the part of

the settling parties would not be in accordance with the agreed-upon California "grossly disproportionate" standard which finds good faith in a settlement which is in the "ballpark." [footnote and citation omitted] The district court committed no error in finding the settlement in good faith even though the amount settled on represented a discounted liability outside the range hypothesized by the court."

In no other field of the law would foreclosure of future and present claims between parties be countenanced upon a "ballpark" guess as to the ultimate disputed facts of liability and damages. Maritime law is sometimes noted for its independence from the common law and band-based principles, but the standards of due process and the Federal Rules of Civil Procedure govern on land and sea.

III. The proportionate allocation rule provides the only choice compatible with fairness and the underlying federal policies favoring settlement and comparative liability in maritime law.

"Adoption of a proportionate fault rule would eliminate all of these problems, . . . by returning the issue of relative culpability to where it belongs, with the jury."

In re Sunrise Securities Litigation, 698 F.Supp.1256, 1260 (E.D. Pa. 1988). In the present case, McDermott and the settling sling defendants' share of liability was tried, found, and judgment rendered thereon. The hook defendants' liability for damages to the Snapper deck, only, was also determined. Nothing other than River Don's payment of the judgment needed to be done in regard to

the deck damages and the settlement. The Court of Appeals' grant to River Don of a second round of contribution from "McDermott/Sling defendants" is erroneous under any "settlement credit" scheme. McDermott prays therefore, for remand and instructions for the entry of judgment in accordance with the verdict.

CONCLUSION

Respondent makes no attempt to promote a fair rule grounded in sound policy and legal bases to account for partial settlements. Its suggestion that the non-settling defendant be granted total control of the process is transparently self-serving and promotes neither fairness, economy, deterrence of unlawful or injurious conduct, nor even the *pro tanto* method's sole strong point – arithmetic certainty. "The comparative fault rule provides a neat solution to these problems." *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985). It is the only rule which encourages settlement by permitting parties to buy their peace on their own terms, yet forfeits nothing in fairness, deterrence, efficiency, and perhaps most notably, due process.

Wherefore, McDermott, Inc. Prays that this Honorable Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, herein, and reinstate the judgment of the trial court, denying the non-settling hook

defendants dollar for dollar credit for the sling defendants' settlement.

Respectfully submitted,

ARDEN J. LEA

Counsel of Record

R. JEFFREY BRIDGER

LEA, PLAVNICKY & SEABOLT, PLC

344 Camp Street, Suite 900

New Orleans, Louisiana 70130

Telephone: (504) 523-4500

Counsel for Petitioner